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No. _____

In The

Supreme Court of the United States

JOHN MICHAEL SCHAEFER,

Petitioner,

vs.

STATE BAR OF NEVADA,

Respondent.

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On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

POTTER LAW OFFICES
CAL J. POTTER, III, ESQ.
Nevada Bar No. 001988
1125 Shadow Lane
Las Vegas, Nevada 89102
(702) 385-1954

Attorneys of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE NEVADA SUPREME COURT RULE 182, WHICH IS A RULE OF PROFESSIONAL RESPONSIBILITY REGULATING AN ATTORNEY'S COMMUNICATION, IN REPRESENTING A CLIENT, WITH CO-PARTIES REPRESENTED BY COUNSEL, IS VAGUE AND THEREFORE IN VIOLATION OF DUE PROCESS?

2. WHETHER PARTIES IN A CASE MAY DIRECTLY COMMUNICATE WITH EACH OTHER WHEN ONE PARTY IS AN ATTORNEY?

3. WHETHER AN ATTORNEY MAY BE DISBARRED FOR CONTACTING CO-PARTIES IN A CASE WHERE THE ATTORNEY IS REPRESENTING HIS WHOLLY OWNED CORPORATION PRO SE?

4. WHETHER A STATE SUPREME COURT VIOLATES AN ATTORNEY'S RIGHT TO DUE PROCESS WHEN THE COURT UPHELD THE STATE BAR HEARING PANEL'S SANCTION OF DISBARMENT, BUT FAILED TO REMAND THE DISCIPLINARY MATTER BACK TO THE PANEL AFTER THE COURT DETERMINED THAT A NUMBER OF THE PANEL'S FINDINGS WERE EITHER UNCONSTITUTIONAL OR UNFOUNDED?

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OPINIONS BELOW

On June 21, 2001, the Supreme Court of Nevada issued an opinion in this case, a copy of which appears in the Appendix to this Petition, p. App. 1. The opinion has been reported as *In re Discipline of Schaefer*, 25 P.3d 191 (Nev. 2001). On September 10, 2001, the Supreme Court of Nevada entered an Order Denying Rehearing in this case, a copy of which appears in the Appendix to this Petition, p. App. 39. The denial of rehearing has been reported as *In re Discipline of Schaefer*, 31 P.3d 365 (Nev. 2001). On May 8, 2000, the State Bar of Nevada, via the Southern Nevada Disciplinary Board Hearing Panel, submitted Findings and Recommendations, a copy of which appears in the Appendix to this Petition, p. App. 32.

JURISDICTION

The judgment of the Supreme Court of Nevada was entered on July 21, 2001. Appendix, p. App. 1. The Order Denying Rehearing and Modifying Opinion on this same cause was entered on September 10, 2001. Appendix, p. App. 39. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Free Speech Clause of the First Amendment to the Constitution of the United States. Said section reads as follows:

> Congress shall make no law . . . abridging . . . freedom of speech. . . .

This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States. Said section reads as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

This case involves the Sixth Amendment to the Constitution of the United States. Said section reads as follows:

> In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defense.

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Pursuant to a preliminary investigation and subsequent Complaint filed by the State Bar of Nevada, the

Southern Nevada branch of the State Bar Disciplinary Board conducted a hearing on January 4, 2000, to determine whether Attorney John Michael Schaefer violated Nevada Supreme Court Rules [hereinafter referred to as SCR] 151, 170, 172, 173, 182, and 203, in consolidated matters designated by Case Numbers 97-161-0868, 99-001-0868, 99-034-0868, and 99-076-0868. This hearing was held after the panel denied Schaefer's request for appointment of counsel, leaving him without representation.

In its Findings and Recommendations dated May 8, 2000, the Disciplinary Board Hearing Panel determined that Schaefer violated the aforementioned rules of professional conduct as alleged in the Complaint.

The Supreme Court of Nevada had jurisdiction over this matter via an automatic appeal from a decision of the State Bar pursuant to SCR 105(3)(b). On June 21, 2001, the Supreme Court of Nevada entered its Opinion, which adopted the recommendations of the Southern Nevada Disciplinary Board in their entirety. Attorney Schaefer was disbarred from the practice of law.

Attorney Schaefer was charged in a complaint filed March 19, 1999, with three counts, alleging violations of SCR 151, 170, 172, 173, 182, 203(3), and 203(4). An additional one count complaint was filed on June 22, 1999, which alleged violations of SCR 151, 172, 182, and 203(4). Those sections read as follows:

> *SCR 151.* A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and

preparation reasonably necessary for the representation.

SCR 170. A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

SCR 172. 1. A lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a tribunal;

(b) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(c) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(d) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

2. The duties stated in subsection 1 continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 156.

3. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

4. In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

SCR 173. A lawyer shall not:

1. Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
2. Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
3. Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
4. In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
5. In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

6. Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
(a) The person is a relative or an employee or other agent of a client; and
(b) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

SCR 182. In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

SCR 203. It is professional misconduct for a lawyer to:

1. Violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
2. Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
3. Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
4. Engage in conduct that is prejudicial to the administration of justice;
5. State or imply an ability to influence improperly a government agency or official; or
6. Knowingly assist a judge or judicial officer in conduct that is a violation of

applicable rules of judicial conduct or other law.

The panel found that Attorney Schaefer violated SCR 203(2), 173(6), 182, and 203(4) when he visited the home of Mr. and Mrs. Robert Fox on March 9, 1998. Appendix, p. App. 33. The panel reasoned that this was a violation because Schaefer was aware that Mrs. Fox was a witness in a criminal case involving Schaefer. Appendix, p. App. 33. The panel neglected to mention that Mr. Fox and other members of the Wimbledon Club Homeowners Association, were defendants in a civil suit brought by Schaefer, pro se. Schaefer wished to speak to Mr. Fox regarding the civil case, and contacted Mr. Fox's attorney, as a courtesy, to request permission to directly contact Mr. Fox. The attorney did not deny the request, so the pro se Schaefer was attempting to contact Mr. Fox on March 9, 1998.

The panel found that Attorney Schaefer violated SCR 173(3) and 203(4) by erroneously preparing an order which awarded Schaefer's wholly owned corporation costs of suit. Appendix, p. App. 33. The panel also found that Attorney Schaefer was uncooperative when opposing counsel requested that he amend the prepared order. Appendix, p. App. 33. However, Schaefer simply prepared the order as he believed the court had orally instructed him to do. Schaefer decided to seek judicial clarification of the court's intent regarding the award of costs in the matter, rather than summarily submitting to opposing counsel's memory as to the court's oral disposition, which conflicted with his own memory.

The panel found that Attorney Schaefer violated SCR 170, 203(1), 203(3), and 203(4) by filing a suit on behalf of the Dan and Evelyn Thaler Trust, without the authorization of the trustees. Appendix, p. App. 34. Mrs. Thaler testified that she did not authorize Attorney Schaefer to sue on behalf of the Thaler Trust, however, no evidence was introduced to the panel, through her testimony or other admissible evidence, that Mrs. Thaler is a Trustee of that trust. In addition, no identified Trustee testified to having withheld authorization for the lawsuit; and the trust documents themselves were not produced. Consequently, the record is absolutely devoid of any evidence whatsoever that Schaefer brought suit on behalf of the Thaler Trust without the authorization and contrary to the interests of the Trustees, or that they were not his clients.[1]

The panel found that Attorney Schaefer violated SCR 203(4) by refusing to pay a $5,000 sanction, after the exhaustion of appeals. Appendix, p. App. 34. The Board reached this conclusion without hearing any non-hearsay evidence to support the allegation. In addition, Attorney Schaefer has since paid the sanction in full.

The panel found that Attorney Schaefer violated SCR 172, 203(3), and 204(4),[2] by filing a false affidavit in connection with a motion for admission pro hac vice in a Texas state court. Appendix, p. App. 35. Schaefer was a defendant in the Texas case, and filed the pro hac vice

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[1] However, Mrs. Thaler admitted that Appellant had indeed formerly represented her.

[2] While the panel asserts that Schaefer violated SCR 204(4), no such rule exists.

with the court, even though he could have elected to simply represent himself pro se. Upon realization of his misinterpretation of the ambiguous affidavit, Schaefer withdrew the motion, retained local counsel, and never actually practiced before the Texas Court on the basis of any alleged misrepresentation.

The panel found that Attorney Schaefer violated SCR 182 by contacting James Fatzinger, the president of the Wimbledon Club Homeowners Association, when the homeowners association was an opposing party to Schaefer's pro se litigation. Appendix, p. App. 35. This finding is predicated exclusively upon the written submissions to Bar Counsel, complaining of Schaefer, authored by Attorney Thomas Smock, another lawyer representing the Wimbledon Club Homeowners Association, and the materials submitted together therewith. However, Schaefer was a party to the litigation, simply contacting another party.

The panel found that Attorney Schaefer violated SCR 182 when he "communicated with corporate representatives of Mirage Resorts, Inc., after being instructed by counsel for Mirage not to do so." This alleged communication involved pending litigation between Schaefer and Mirage Resorts. Again, this finding is predicated exclusively upon the pre-hearing written submission of a lawyer who was not a percipient witness to the assertions set forth therein; consisting entirely of hearsay. In addition, Schaefer was a party to the litigation, simply contacting another party.

These findings by the panel reflect their disregard for Schaefer's rights as a party before the court, right to free

speech, and equal access to the courts. The panel was operating under the theory that a member of the bar, who is a pro se litigant, is an attorney first, then a party. This theory greatly diminishes Schaefer's First, Fifth, Sixth, and Fourteenth Amendment rights, without justification.

The Nevada Supreme Court approved the panels interpretation of SCR 182, but determined that it was unconstitutional as applied to Attorney Schaefer, individually. Appendix, p. App. 22. However, the Nevada court upheld the panels application of SCR 182 to Schaefer's wholly owned corporation, Schaefer, Inc. Appendix, pp. App. 22-23. The Supreme Court of Nevada disregarded the panels other two findings of SCR 182 violations, the SCR 203(1) violation, the SCR 203(2) violation, and four of the SCR 203(4) violations, as these violations were never charged in the complaint.[3] Appendix, p. App. 29. Despite finding that SCR 182 was unconstitutional as applied to Schaefer individually, and that several other violations found by the panel should be disregarded, the court refused to remand the matter back to the panel to recommend a sanction consistent with its ruling.

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[3] The Supreme Court of Nevada declined to afford Attorney Schaefer an oral argument.

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REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT MAY ENDEAVOR TO SETTLE THE DISPUTE AMONG THE STATES REGARDING THE MODEL RULES AND COMMUNICATIONS BETWEEN A PRO SE LITIGANT, WHO IS ALSO A MEMBER OF THE BAR, AND OPPOSING PARTIES.

The conduct of attorneys is essentially and primarily self-regulated through rules of professional responsibility enforced by state bar associations. Nevada SCR 150 is a verbatim adoption of the Model Rules of Professional Responsibility promulgated by the American Bar Association. See *Model Rules of Professional Conduct 1.15* (1988). This case raises issues regarding attorney conduct which, if addressed by this Honorable Court, would benefit and guide much of the practicing bar in this country, and settle a dispute among the States.

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720 (1991) this Court struck down Nevada Supreme Court Rule 177 (Trial publicity), as interpreted by the Nevada court. This Honorable Court held that SCR 177 was void for vagueness pursuant to the First and Fourteenth Amendments, as applied to free speech and due process rights of attorneys in disciplinary proceedings. Petitioner respectfully submits that Nevada's Supreme Court Rules (SCR's), as interpreted and applied by the Nevada Supreme Court in this case, violates his First, Fifth, Sixth, and Fourteenth Amendment rights to free speech, due process, effective assistance of counsel, and equal protection. The Nevada Supreme Court held that

SCR 182 prohibits contact between pro se attorney litigants, and co-litigants. While not applying this newly interpreted rule to petitioner in cases brought by him personally, the court did apply SCR 182 where Schaefer was a pro se litigant representing his wholly owned company.

Thus, petitioner respectfully submits that, like the Nevada Supreme Court Rule invalidated by this Court in *Gentile v. State Bar of Nevada, supra*, 501 U.S. 1030 (1991), SCR 182, as interpreted and applied by the Nevada Supreme Court in this case, fails to provide fair notice of any prohibition upon communications by attorneys who are pro se party-litigants. Also as in *Gentile*, the provisions of SCR 182, as applied by the Nevada Supreme Court, have no settled usage or tradition of interpretation in law. For, indeed, this was a case of first impression in the Nevada court. Accordingly, no Nevada Supreme Court case law supplied any guidance to attorneys in their construction of Rule 182 in the present context or supports the interpretation and application of the Rule by the Nevada Supreme Court. As such, any conduct by Schaefer, when representing himself, or his wholly owned company, pro se, should not have been considered when determining a sanction.

Converse to Nevada's new policy, Rule 4.2 of the American Bar Association *Model Rules of Professional Conduct*, after which SCR 182 is patterned, is directly adverse to the Nevada court's interpretation of SCR 182 in this case. Indeed, the comment to ABA Model Rule 4.2 expressly states that "*parties to a matter may communicate directly with each other.*" (Emphasis added).

Similarly, the corresponding California rule governing attorney communication with a represented party, in accordance with ABA Model Rule 4.2, (which likewise is a virtually verbatim provision tracking the precise language of SCR 182), authorizes such lawyer-litigant communications as are complained of by the Bar in the instant case, and is directly adverse to the interpretation of SCR 182 by the Nevada Supreme Court.

California Rule of Professional Conduct 2-100(A) provides as follows:

> *While representing a client*, a member shall not communicate directly or indirectly about the subject of the *representation* with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer. (Emphasis added).

As expressly set forth in the commentary to the California rule:

> Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation. . . . *Moreover, the rule does not prohibit a member* [i.e. of the bar] *who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status.* To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party. (Emphasis added).

Thus, as the Connecticut Supreme Court specifically held in *Pinsky v. Statewide Grievance Committee*, 578 A.2d 1075 (Conn. 1990), where an attorney is acting on his own behalf he is not "representing a client"; and therefore, does not violate the rules of professional ethics when contacting an opposing party, even though that party is represented by counsel.

Similarly, in *In Re Mettler*, 748 P.2d 1010 (Ore. 1988), the Supreme Court of Oregon reviewed the Oregon counterpart of SCR 182, Oregon Code of Professional Responsibility Rule DR7-104(A)(1), which read as follows:

> ***During the course of his representation of a client*** a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation or on directly related subjects, with a person he knows to be represented by a lawyer on that subject, or directly related subjects, unless he has the prior consent of the lawyer representing such other person, or is authorized by law to do so. (Emphasis added).

The Court held that the phrase: "During the course of his representation of a client" presented a *"threshold requirement"* for a finding of misconduct under the Rule and conducted a thorough review of the terms, "lawyer", "course of representation" and "client"; ruling that the provision did not apply to pro se lawyer/parties.

Vagueness is concerned with the clarity of the law. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), this Honorable Court held that Nevada's SCR 177 failed to provide fair notice. In the case at hand, SCR 182, as applied by the Nevada Supreme Court, fails to provide

fair notice of prohibition upon communications by attorneys who are pro se party-litigants.

The ABA Model Rule 4.2 expressly states that "parties to a matter may communicate directly with each other." The California counterpart to SCR 182 also does not prohibit a member of the bar, who is also a party to the legal matter, from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. (Rule 2-100) (California Rule).

While the Supreme Court of Nevada ruled that SCR 182, as applied to Schaefer individually, was unconstitutional, the court still affirmed the recommended sanction which was largely based on his contact with other parties. Petitioner submits to this Honorable Court that this action by the Supreme Court of Nevada violated Schaefer's constitutional rights, and that there is dispute among the States as to constitutional rights of attorneys, appearing pro se, to communicate with opposing parties. This dispute may only be resolved by the action of this Honorable Court.

II. THIS MATTER SHOULD BE REMANDED TO DETERMINE WHAT SANCTION, IF ANY, SHOULD BE IMPOSED.

In the instant case, the major pattern of misconduct centered on Schaefer's alleged contact with co-litigants in actions in which he represents himself individually, and his wholly owned corporation, pro se. The Supreme

Court of Nevada ruled that SCR 182, as applied to Schaefer individually, was unconstitutional. Appendix, p. App. 22. In addition, the court disregarded the panels other two findings of SCR 182 violations, the SCR 203(1) violation, the SCR 203(2) violation, and four of the SCR 203(4) violations, as these violations were never charged in the complaint. Appendix, p. App. 29. Accordingly, the Nevada court should have remanded this matter back to the Southern Nevada Disciplinary Panel to issue a recommendation in accordance with the opinion. The Nevada court's failure to remand this matter back to the panel, violated Schaefer's right to due process. See *U.S. v. Young*, 470 U.S. 1, 30-31, 105 S.Ct. 1038, 1053-54 (1985) (opinion concurring in part and dissenting in part).

The Nevada Supreme Court held in *Board of Medical Examiner's v. Potter*, 99 Nev. 162, 659 P.2d 868 (1983) that where the State Board of Medical Examiners revoked a physician's license to practice medicine on the basis of two charges, only one of which was supported by the record, and it was unknown whether the Board would have revoked the physician's license without the additional charge, remand to the Board was necessary in order for the Board to determine what sanction, if any, should be imposed on charge which was supported by the evidence. See, e.g., *Biegler v. Nevada Real Est. Div.*, 95 Nev. 691, 601 P.2d 419 (1979).

Despite the fact that the Supreme Court of Nevada determined that SCR 182 was unconstitutionally applied to Schaefer, and that several other violations found by the panel should be disregarded, the court refused to remand the matter back to the panel, but instead chose to uphold the sanction imposed by the panel. Petitioner submits that this action by the Supreme Court of Nevada violated

his right to due process, under the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Nevada in *In re Discipline of J. Michael Schaefer*. In the event that the Petition is granted, Petitioner prays that the order of disbarment below be reversed and that the cause be remanded for proceedings consistent with the Court's decision.

DATED this 6th day of December, 2001.

Respectfully Submitted,

POTTER LAW OFFICES

CAL J. POTTER, III, ESQ.
1125 Shadow Lane
Las Vegas, NV 89102
(702) 385-1954
Attorneys of Record for Petitioner

Potter

Pgy day
52 Gov.
P. Bird
Fri

App. 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF) No. 36173
J. MICHAEL SCHAEFER.)
)

Automatic appeal from a decision by a Southern Nevada Disciplinary Board hearing panel, recommending disbarment.

Recommendation approved.

J. Michael Schaefer and Potter Law Offices, Las Vegas, for attorney John Michael Schaefer.

Rob W. Bare, Bar Counsel, and Michael J. Warhola and Felicia Galatti, Assistant Bar Counsel, for State Bar of Nevada.

BEFORE THE COURT EN BANC.

OPINION

(Filed Jun. 21, 2001)

PER CURIAM:

Two formal disciplinary complaints representing four grievances against attorney John Michael Schaefer were brought by the state bar and were consolidated for hearing before a panel of the Southern Nevada Disciplinary Board. The panel found that Schaefer had violated several professional conduct rules, including Supreme Court

Rule 182, which prohibits a lawyer from directly contacting a represented party without the consent of that party's counsel, unless the contact is otherwise authorized by law. Some of the SCR 182 violations found by the panel occurred during the course of litigation in which Schaefer was representing himself. Schaefer asserts that he did not violate SCR 182 by contacting represented parties while he was representing only himself.

We conclude that the purposes underlying SCR 182 are better served by applying the rule to lawyers representing themselves, as well as when representing other clients. But given the existence of conflicting authority from other jurisdictions and the absence of guidance from this court on the rule's scope at the time of Schaefer's actions, SCR 182 is unconstitutionally vague as applied to Schaefer's conduct when he was representing himself. Accordingly, these violations cannot be considered in determining the appropriate discipline to be imposed. We conclude, however, that the bulk of the remaining violations are supported by clear and convincing evidence, and that disbarment is warranted in light of Schaefer's conduct.

FACTUAL AND PROCEDURAL HISTORY

First disciplinary complaint

The first disciplinary complaint filed against Schaefer included three counts. Count I of the first complaint alleged violations of SCR 151 (competence), SCR 170 (meritorious claims), SCR 172 (candor toward the tribunal), SCR 173 (fairness toward opposing party and counsel), and SCR 203(3) (misconduct involving dishonesty,

deceit, fraud or misrepresentation). Count II alleged violations of SCR 172 (candor toward the tribunal) and SCR 203(3) (misconduct involving dishonesty, deceit, fraud or misrepresentation). Count III alleged violations of SCR 173 (fairness toward opposing party and counsel), SCR 182 (communication with person represented by counsel) and SCR 203(4) (conduct prejudicial to the administration of justice).

Counts I and III

Counts I and III were based on Schaefer's conduct during the litigation of several disputes between Schaefer and his condominium association. Schaefer is president of Schaefer, Inc., which owns several condominium units at Wimbledon Tennis Club Condominiums in Southern Nevada. Schaefer lives in one of the units; the others are leased to tenants. He has had several disputes with his neighbors and with the Wimbledon Tennis Club Condominium Association (the "Association"). The record reflects that in 1996 and 1997, these disputes became so pervasive that realtors attempting to market other condominium units were compelled to disclose to potential buyers that a litigious attorney lived there.

The first litigation pertinent to this case was commenced in March 1997. On behalf of Schaefer, Inc., Schaefer filed a complaint against the Association, seeking a permanent injunction that would preserve his voting rights in the Association and confirm his eligibility to run for the Association's governing board. The Association stipulated to this relief, and the court approved the stipulation and ordered each party to bear its own costs.

Schaefer was directed to prepare the order. Despite the fact that no costs were awarded, Schaefer included an award of costs to Schaefer, Inc., in the draft order. He then submitted the order to the court for signature, without providing it to opposing counsel for approval despite counsel's request that he do so. The court inadvertently entered the order. When opposing counsel became aware of the order, he asked Schaefer to stipulate to the entry of an amended order deleting the cost award. Schaefer refused, and so opposing counsel was required to file a motion to amend the order, which the court granted.

In April 1997, Schaefer filed an action against the Association and its board members, alleging that they conspired to have another resident assault him. Two weeks later, Schaefer was charged with five counts of misdemeanor battery. One of the complaining witnesses was a Mrs. Fox, the spouse of an Association board member; another was the resident with whom the Association board members had allegedly conspired. Schaefer was later convicted of two counts of misdemeanor battery, after which post-trial proceedings continued for approximately one year. Those proceedings included a motion for a new trial and an appeal.

During the criminal case, the justice's court verbally issued a "no-contact" order, expressly prohibiting Schaefer from having any contact with Mrs. Fox. At the time the order was entered, Schaefer and the Foxes all lived in the condominium complex.

After the no-contact order was entered, and while the criminal case was still pending, the Foxes moved to a house in Las Vegas. On the evening of March 9, 1998,

Schaefer went to their house and knocked on the door. Mrs. Fox answered and demanded that he leave immediately. Schaefer gave her a handwritten letter for Mr. Fox. In the letter, Schaefer offered to dismiss Mr. Fox as a defendant in the conspiracy case if the Foxes agreed to cooperate with Schaefer in the criminal case. Schaefer also left his business card with a note referencing the letter on the windshield of the Foxes' car.

During the disciplinary proceedings in this case, Schaefer admitted in both his written papers and his testimony at the hearing that he knew Mr. Fox was represented by counsel in the conspiracy case, and that the no-contact order was in effect at the time of this encounter.

In August 1997, Schaefer filed an action seeking a receiver for the Association. Named as plaintiffs were Schaefer, Inc., an individual resident, and a family trust that owned one of the units. Five days before the complaint was filed, the trustee had left on an extended trip to Europe. The trustee did not authorize Schaefer to file a complaint and was not aware that the trust had been included as a plaintiff.

When the trustee returned to Las Vegas, she discovered the litigation. A receivership was contrary to the trust's best interests, as the trustee was trying to sell the unit owned by the trust and a receivership could cloud the title and impair the marketability of the unit. The trustee notified Schaefer of her anger and unwillingness to be a party to the litigation. Schaefer responded with a letter attempting to persuade the trustee to change her mind, and asking her to sign a sworn statement granting retroactive authorization for the lawsuit. The trustee

refused and notified the Association's attorney that Schaefer was not authorized to represent the trust.

In his testimony at the disciplinary hearing, Schaefer admitted that he did not notify the trustee of his intent to initiate a receivership complaint, that he neither requested nor received the trustee's authorization to act for the trust, and that he improperly commenced legal proceedings on behalf of the trust. He asserted in his trial brief to the hearing panel that he had previously represented the trustee in other unrelated matters, and that he felt he had a "certain leeway" to represent her interests while she was away.

Schaefer also directed written communication to six Association board members in an effort to persuade them to join the receivership action as plaintiffs. He did so even though he was aware that the Association was represented by counsel.

The action was dismissed, and Schaefer was sanctioned $5,000 for filing a frivolous complaint. As of the date of the disciplinary hearing in this matter, over two years later, Schaefer still had not paid the sanctions.

Schaefer and the Association's counsel engaged in negotiations for a global settlement of the pending litigation, with the exception of Schaefer's conspiracy action, which was being handled by the Association's insurance defense counsel. During the settlement negotiations, Schaefer repeatedly directed communications to the Association's president, despite Schaefer's knowledge that the Association was represented by counsel, in an attempt to coerce the president into dismissing counsel. Schaefer also asked to be substituted in as counsel for the

Association, despite the fact that he was counsel for an adverse party (Schaefer, Inc.) in the litigation. The president was greatly disturbed by these communications, and his wife was frightened because Schaefer had slipped some of the communications under their door late at night. Schaefer also contacted several board members about the settlement without counsel's consent.

In both his written papers before the hearing panel and in his testimony at the hearing, Schaefer admitted to authoring the letters at issue, and that he attempted to have himself substituted as counsel for the Association.

Count II

Count II of the first complaint was based on Schaefer's failure to disclose his disciplinary history in a pro hac vice application to a Texas court. Schaefer filed the application in order to represent a trust of which he was trustee. In his affidavit, dated in November 1998, he represented that he had not been subject to discipline for any events occurring within the last five years, but admitted that he had received a public reprimand for conduct occurring in December 1992, before the five-year period.

Schaefer's affidavit was inaccurate and misleading. In fact, Schaefer had been publicly reprimanded in California in 1993 for conduct that occurred at least in part in 1993, and received a public reprimand from this court as reciprocal discipline in 1995. Schaefer was also suspended in California in October 1997, for which he also received reciprocal discipline in Nevada in May 1998. Schaefer failed to disclose this disciplinary history to the Texas court.

The panel found that Schaefer had violated SCR 172 (candor toward the tribunal), SCR 203(3) (misconduct involving dishonesty, deceit, fraud or misrepresentation) and SCR 203(4) (conduct prejudicial to the administration of justice).

Second disciplinary complaint

A second disciplinary complaint was filed after the first complaint, and contained one count. This count alleged violations of SCR 151 (competence), SCR 172 (candor toward the tribunal), SCR 182 (communication with person represented by counsel), SCR 197 (communication with prospective clients) and SCR 203(4) (conduct prejudicial to the administration of justice). The charges were based on Schaefer's conduct during litigation between Schaefer and Mirage Resorts, Inc.

Schaefer filed two lawsuits on his own behalf against Mirage Resorts, Inc., and its subsidiaries. The claims asserted were based on Mirage's refusal to extend credit to Schaefer, and its decision to bar Schaefer from all Mirage properties. While these cases were pending, Schaefer was specifically instructed by general counsel for Mirage Resorts, Inc., to direct all communication through him. Despite this instruction, Schaefer repeatedly sent letters to various representatives of the Mirage companies, including the Mirage Resorts CEO, the Mirage Resorts secretary, the Bellagio general counsel, who had been named as a defendant in one of the suits, the Bellagio president, the Mirage general counsel, and two attorneys in the Mirage general counsel's office. All of the communications referred to the pending cases; some also

mentioned that Schaefer owned Mirage stock. The panel found that Schaefer violated SCR 182 by communicating directly with officers, directors and employees of the Mirage concerning the pending litigation.

Disciplinary proceedings

The two disciplinary complaints were consolidated for formal hearing before a hearing panel of the Southern Nevada Disciplinary Board. The record reflects that Schaefer and the state bar orally agreed in June 1999 to set the hearing for November 17, 1999, and this date was confirmed by both parties in written correspondence. The state bar served formal notice of the hearing on Schaefer by certified mail, return receipt requested, on October 13, 1999. The return receipt was signed on October 14, 1999.

On October 23, 1999, Schaefer moved to continue the hearing, claiming that the press of other work, including a campaign for public office in San Francisco, prevented him from preparing for the hearing. The state bar opposed the motion. An order denying the motion to continue was entered by the chair of the Southern Nevada Disciplinary Board on November 5, 1999.

The day before the November 17 hearing, Schaefer's counsel and bar counsel were engaged in settlement discussions. By the end of the day, it appeared that an agreement had been reached for a conditional guilty plea in exchange for a stated form of discipline. Based on this agreement, bar counsel notified the seven anticipated witnesses that they need not appear, and informed the panel members that instead of a full hearing, there would be a presentation of the agreement for approval.

At the November 17 hearing, Schaefer's counsel indicated that, contrary to his advice, Schaefer would not accept the plea agreement without a ruling from the panel on the scope of SCR 182, specifically, whether it applied to an attorney appearing on his own behalf. Schaefer's counsel then withdrew. The panel asked bar counsel whether the state bar would agree to severing the SCR 182 violations from the rest of the case, and bar counsel explained that the state bar would not agree. Accordingly, as no witnesses were present, the panel had no alternative but to continue the hearing.

Schaefer stated that he needed to obtain new counsel. The panel chair suggested that Schaefer should do so immediately, as every attempt would be made to reschedule the hearing as soon as possible. Schaefer indicated that he needed only a week's notice. Bar counsel explained that given the schedules of bar personnel, the panel members, Schaefer and his new counsel, and the witnesses, the continued hearing would likely be in "January sometime." The continued hearing was set for January 4, 2000, notice of which was served on Schaefer by certified mail, return receipt requested, on November 30, 1999; the return receipt was signed by Schaefer on December 6, 1999. On December 16, 1999, Schaefer moved for a continuance of the January 4 date; the motion was denied on December 23, 1999.

After the hearing and receipt of post-trial briefs from both Schaefer and the state bar, the panel issued its findings and recommendation.

In connection with the counts based on the litigation with the Association, the panel found that Schaefer had

committed one violation of SCR 170 (meritorious claims), one violation of SCR 173(3) (fairness to opposing party and counsel: disobeying obligation to tribunal), one violation of SCR 173(6) (fairness to opposing party and counsel: request that witness refrain from providing information), three violations of SCR 182 (communication with represented person), one violation of SCR 203(1) (violation of the rules of professional conduct), one violation of SCR 203(2) (criminal act reflecting adversely on lawyer's fitness to practice), one violation of SCR 203(3) (misconduct involving dishonesty, deceit, fraud or misrepresentation) and four violations of SCR 203(4) (conduct prejudicial to administration of justice).

In connection with the Texas case, the panel found that Schaefer had violated SCR 172 (candor toward the tribunal), SCR 203(3) (misconduct involving dishonesty, deceit, fraud or misrepresentation), and SCR 203(4) (conduct prejudicial to administration of justice). With respect to the Mirage Resorts litigation, the panel found that Schaefer had violated SCR 182 (contact with represented persons).

The panel also found that the aggravating factors of a pattern of misconduct, multiple offenses, and a refusal by Schaefer to acknowledge the wrongfulness of his actions had been shown by clear and convincing evidence. Based on these findings, the panel recommended that Schaefer be disbarred.

DISCUSSION

We are presented with several issues in this case. First, we must determine whether SCR 182, a rule of

professional conduct that prohibits lawyers from directly contacting represented parties, applies to communications by a lawyer appearing pro se. If so, we must decide whether the rule may constitutionally be enforced in this case. A related issue is whether a lawyer who is a corporate principal, and who litigates on behalf of the corporation, may be considered to be appearing "pro se." With respect to the hearing panel's findings and recommendation, we must decide whether the ethical violations found by the panel are supported by clear and convincing evidence, and if so, whether disbarment is the appropriate discipline. Finally, Schaefer raises a procedural issue concerning the scheduling of the formal hearing.

Scope of SCR 182

SCR 182 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The purpose of the rule is generally regarded as twofold: first, it prevents lawyers from taking advantage of laypersons, and second, it preserves the integrity of the attorney-client relationship.[1] The rule also prevents inadvertent disclosure of privileged information by the

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[1] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995); *see Faison v. Thornton*, 863 F.Supp. 1204, 1213 (D. Nev. 1993) (recognizing that SCR 182 is "designed to preserve the integrity of the attorney-client relationship").

layperson.[2] The issue in this case is whether the word "client" in the introductory phrase includes the lawyer himself, or means only a separate person who retains the lawyer.

Schaefer argues that SCR 182 does not prohibit a lawyer who is representing himself in a case from directly contacting another party to the case who is represented by counsel. In support, Schaefer cites to the commentary to ABA Model Rule 4.2, which is nearly identical to SCR 182, as well as authority from other jurisdictions holding that SCR 182 does not prohibit a lawyer representing himself from contacting represented parties.

Comment 1 to Model Rule 4.2 provides that "parties to a matter may communicate directly with each other."[3] The comment does not specifically address the situation of a lawyer appearing pro se. Courts in some jurisdictions that have adopted Model Rule 4.2 have concluded that the rule does not prohibit contact when the lawyer represents himself.[4]

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[2] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995).

[3] American Bar Association, *Annotated Model Rules of Professional Conduct* 397 (4th ed. 1999).

[4] *See, e.g., Pinsky v. Statewide Grievance Committee*, 578 A.2d 1075 (Conn. 1990); California Rule of Professional Conduct 2-100 cmt. (discussing California's version of Model Rule 4.2, nearly identical to Nevada's SCR 182, and stating that a lawyer who is also a party may communicate on his own behalf with a represented party, as the lawyer has independent rights as a party that are not abrogated by his professional status).

The majority of courts considering the issue, however, have noted that the purposes served by the rule are equally present when the lawyer appears pro se.[5] The lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se. Consequently, these courts have enforced the rule in situations where a pro se lawyer makes direct contact with a represented party.

The state bar's Standing Committee on Ethics and Professional Responsibility came to the same conclusion in a 1988 non-binding formal opinion ("Formal Opinion 8").[6] The committee determined that SCR 182 applies to a lawyer appearing pro se, and bars the lawyer from directly contacting an opposing party who is represented by counsel.[7] We agree, and conclude that the purposes of the rule are better served by applying it to lawyers who are representing themselves.

A related issue is whether a lawyer who litigates on behalf of a corporation of which he is a principal is subject to the rule's restrictions on contact. Schaefer argues that SCR 44, which provides that nothing in the

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[5] *See, e.g., Runsvold v. Idaho State Bar*, 925 P.2d 1118 (Idaho 1996); *In re Segall*, 509 N.E.2d 988 (Ill. 1987); *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994); *see also* D.C. Bar Legal Ethics Comm., Op. 258 (1995).

[6] State Bar of Nevada Standing Comm. on Ethics and Professional Responsibility, Formal Op. 8 (1988).

[7] *Id.*

Supreme Court Rules prohibits a person from representing himself in any court except the supreme court, together with SCR 2(8), which provides that "person" includes a corporation, means that he is entitled to represent Schaefer, Inc., as a pro se litigant. Thus, according to Schaefer, he is not representing a separate "client," and so the rule does not apply.

We have consistently held that a legal entity such as a corporation cannot appear except through counsel, and we have prohibited non-lawyer principals from representing these types of entities.[8] Based on our prior cases, a lawyer principal who appears on behalf of his corporation is clearly acting in his capacity as a lawyer representing a client, not as a principal of the corporation. We therefore conclude that SCR 182 applies in these situations. In addition, in light of our clear rulings on this issue, we reject Schaefer's argument that SCR 182 as applied to such situations is void for vagueness.

Finally, Schaefer contends that his contact with the Mirage Resorts officers and employees was permissible because he is a Mirage shareholder. According to Schaefer, SCR 182 only prohibits communication concerning the subject of the litigation. Schaefer thus argues that his

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[8] *Guerin v. Guerin*, 116 Nev. 210, 993 P.2d 1256; *Sunde v. Contel of California*, 112 Nev. 541, 915 P.2d 298 (1996); *Salman v. Newell*, 110 Nev. 1333, 885 P.2d 607 (1994).

letters to Mirage employees[9] and directors did not violate SCR 182 as they concerned shareholder matters.

SCR 182 bars only communication concerning the "subject of the representation." Thus, communications from Schaefer concerning matters of interest to Mirage shareholders unrelated to the pending litigation would not be barred by the rule. Here, however, while several letters in the record raise shareholder-type concerns, many do not. In addition, even those including shareholder concerns also discuss the pending litigation. Accordingly, Schaefer's conduct was within the scope of SCR 182.

Constitutionality of SCR 182

Schaefer makes several constitutional arguments against enforcement of SCR 182. First, Schaefer argues that since the rule prohibits speech about a particular subject, *i.e.*, "the subject of the representation," it is a presumptively invalid content-based restriction that must withstand strict scrutiny to be constitutional.

We note that Schaefer cites no authority in support of his argument, and so it need not be considered.[10] Moreover, the argument is clearly without merit. In *Gentile v.*

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[9] The particular employees here were unquestionably within the scope of SCR 182, as they were all management-level employees. *See Cronin v. District Court*, 105 Nev. 635, 781 P.2d 1150 (1989).

[10] *SIIS v. Buckley*, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984).

State Bar of Nevada,[11] the United States Supreme Court held that a lawyer's speech in pending cases is subject to a greater degree of regulation than that of the press. In addition, the Supreme Court has pointed out that the term "content-based" generally refers to whether the speech is prohibited on the basis of viewpoint,[12] and that "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."[13] A regulation is not an invalid content-based restriction merely because one must review the speech's content in order to determine whether the regulation has been violated.[14] We thus conclude that SCR 182 is not a content-based restriction, but rather is content neutral.

As a content neutral restriction on speech, SCR 182 is constitutional if it is within the government's power, it furthers an important government interest unrelated to the suppression of free expression, and the incidental restriction on free expression is no greater than necessary.[15] We conclude that under this test, SCR 182 is constitutional. First, it is within this court's power to promulgate rules governing the legal profession, and so SCR 182 is within the government's power. Next, the rule furthers the important interests of protecting the attorney-client relationship from interference and protecting

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[11] 501 U.S. 1030, 1074 (1991).

[12] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[13] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994).

[14] *Hill v. Colorado*, 120 S.Ct. 2480, 2492 (2000).

[15] *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

laypersons from overbearing by an opposing lawyer; this interest is unrelated to the suppression of free expression. Finally, the restriction on speech is no greater than necessary. A lawyer is not prohibited from all speech or contact; rather, the lawyer must obtain permission from opposing counsel, or must otherwise be authorized by law to make direct contact with a represented person regarding the subject of the representation.

Schaefer next argues that SCR 182, as applied to him when he was representing himself or Schaefer, Inc., is unconstitutionally vague, in that SCR 182 does not make clear what conduct is prohibited. Schaefer argues that the introductory phrase of the rule, "[i]n representing a client," suggests that the lawyer and the client are not the same, and consequently, a self-represented lawyer is not subject to the rule. In support, he cites authority from California and Connecticut indicating that the rule does not apply to lawyers appearing pro se.[16] He also argues that Formal Opinion 8 is not binding, and moreover does not clearly state that lawyers appearing pro se are prohibited from contacting represented parties.

The state bar argues that, as Schaefer is a lawyer, he should be held to a greater understanding of the rules than a layperson unfamiliar with statutory interpretation. In support, the state bar cites Wisconsin authority holding that a rule requiring a lawyer to abstain from "an offensive personality" clearly established the prohibited

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[16] *Pinsky*, 578 A.2d at 1079; California Rule of Professional Conduct 2-100 cml.

conduct,[17] and a Ninth Circuit decision indicating that a rule requiring a lawyer to refrain from "conduct unbecoming a member of the bar" was sufficiently clear.[18] The state bar argues that Schaefer was on notice that his conduct was prohibited by Formal Opinion 8, and by Schaefer's 1981 public reprimand for similar conduct.

Schaefer is correct in noting that Formal Opinion 8 is non-binding. But Schaefer's analysis of the opinion is flawed. The opinion clearly prohibits contact between a lawyer-party and opposing parties whom the lawyer knows are represented by counsel. The committee acknowledged that the rule could be subject to different interpretations, and noted the existence of conflicting authority. Nevertheless, the committee concluded that the better-reasoned position is that SCR 182 applies to lawyers appearing pro se.

As stated by the United States Supreme Court in 1926, a statute or rule is impermissibly vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[19] This remains the test today.[20] It is well-settled that, in evaluating whether a statute is vague, judicial opinions construing the statute should be considered.[21] "[T]he touchstone

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[17] *Matter of Beaver*, 510 N.W.2d 129, 133 (Wis. 1994).

[18] *United States v. Hearst*, 638 F.2d 1190, 1197 (9th Cir. 1980).

[19] *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

[20] *United States v. Lanier*, 520 U.S. 259, 266 (1997).

[21] *Lanier*, 520 U.S. at 266-67, *Bouie v. City of Columbia*, 378 U.S. 347, 355, 362 (1964); *Winters v. New York*, 333 U.S. 507,

is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the . . . conduct was [prohibited]."[22] In addition, questions of vagueness must be more closely examined where First Amendment rights are implicated.[23]

We conclude that the non-binding nature of Formal Opinion 8, together with the existence of conflicting authority from other jurisdictions, renders SCR 182 vague as applied to Schaefer when he represented himself in the litigation at issue. In the absence of clear guidance from this court, Schaefer could have reasonably concluded that the rule did not apply in situations where he was self-represented. While a lawyer-party's insistence on contacting represented parties, even in the face of specific requests not to do so, could be viewed as unprofessional, SCR 182 arguably did not clearly prohibit the contact.

We are not persuaded otherwise by the state bar's cited authority. In *Matter of Beaver*, the Wisconsin court

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514-15 (1948) (noting that an individual is "chargeable with knowledge of the scope of subsequent interpretation" of a statute); *Minnesota v. Probate Court*, 309 U.S. 270, 273-74 (1940); *Lanzetta v. New Jersey*, 306 U.S. 451, 456 (1939); *Hicklin v. Coney*, 290 U.S. 169, 172 (1933); *Bandini Co. v. Superior Court*, 284 U.S. 8, 17-18 (1931); *Fox v. Washington*, 236 U.S. 273, 277 (1915).

[22] *Lanier*, 520 U.S. at 267.

[23] *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844, 870-72 (1997) (noting that even if a statute is not so vague as to violate due process, it may be impermissibly vague under the First Amendment if it chills protected speech). As discussed above, we conclude that SCR 182 does not violate the First Amendment.

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considered that the term "offensive personality" had been sufficiently defined by case law and by its incorporation into the ethical rules of the state.[24] Here, no binding case law from this court interpreting SCR 182 was available during the time period at issue. Additionally, the rule in California, where Schaefer is also admitted to practice, permits direct contact by a self-represented lawyer with a represented person.

In *United States v. Hearst*,[25] the Ninth Circuit referred Patricia Hearst's defense counsel, F. Lee Bailey and J. Albert Johnson, for investigation by disciplinary authorities based on their contract for a book about the case, which created at least a potential conflict of interest with their client. The court interpreted the term "conduct unbecoming a member of the bar" to incorporate the legal profession's "code of behavior"; in addition, the court relied on several other specific rules in determining that the lawyers' conduct should be investigated more fully in a disciplinary proceeding.[26] Here, no additional "code" or rules render SCR 182 any more clear with respect to a self-represented lawyer.

In addition, we decline to consider Schaefer's 1981 reprimand as providing notice concerning SCR 182. Schaefer was publicly reprimanded in part for violating SCR 190, which in 1981, provided as follows:

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[24] 510 N.W.2d at 132-34.

[25] 638 F.2d at 1193-95.

[26] *Id.* at 1197-99.

> A member of the state bar shall not in any way communicate upon the subject of controversy with a party represented by counsel. . . .

This version of the rule did not include the prefatory language of the current version of SCR 182, "[i]n representing a client," and clearly forbade a lawyer from contacting a represented party under all circumstances concerning the "subject of controversy." In contrast, the current version of SCR 182 arguably lends itself to some confusion when a lawyer is self-represented.

Accordingly, to the extent that the violations of SCR 182 found by the panel rely on instances in which Schaefer was representing himself, they may not be considered in determining the appropriate discipline to be imposed in this case. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decisions has fairly disclosed to be within its scope."[27] While SCR 182 is not a criminal statute, nor is our construction precisely "novel" in light of Formal Opinion 8 and the decisions of several other jurisdictions, SCR 182 did not "fairly disclose" that direct contacts with represented parties while a lawyer is self-represented are forbidden. Nevada's lawyers are now on notice, however, that SCR 182 applies to them even when they are representing themselves. As discussed above, Schaefer's argument that the rule is

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[27] *Lanier*, 520 U.S. at 266; *see also Bouie*, 378 U.S. at 355, 362 (providing that judicial construction can cure vagueness, but not retroactively, particularly where the construction broadens the conduct covered by the statute).

vague as applied to situations where he represented Schaefer, Inc., is without merit.

Schaefer next argues that SCR 182 is unconstitutionally overbroad because unobjectionable contact such as settlement discussions are included within the rule's scope. He cites no relevant authority in support of his argument, and it therefore need not be considered.[28] In addition, we note that a settlement discussion between a lawyer-party and a represented party is precisely the type of contact that raises some of the major concerns addressed by the rule. The lay party is at a disadvantage, and may inadvertently disclose privileged information during the course of such discussions.

For an enactment to be overbroad on its face, it must reach a substantial amount of constitutionally protected conduct.[29] Here, the rule only proscribes contact concerning the subject matter of a pending case with respect to which the lawyer knows the party to be represented. This proscription protects the party from potentially domineering behavior and preserves the attorney-client relationship between the party and counsel. As discussed above, a lawyer's speech concerning a pending case is subject to greater regulation than other forms of speech.[30] Accordingly, the rule does not reach a substantial amount of constitutionally protected speech. As Schaefer has not articulated how the rule is overbroad as applied to him,

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[28] *Buckley*, 100 Nev. at 382, 682 P.2d at 1390.

[29] *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982).

[30] *Gentile*, 501 U.S. at 1074.

and the rule is not overbroad on its face, we conclude that his argument is without merit.

Schaefer's final constitutional argument concerns his Sixth Amendment rights as a criminal defendant. He asserts that his contact with the Foxes was "authorized by law" because as a pro se defendant in the criminal case, he had a right to contact the witnesses in that case. He claims that he had this right even though a no-contact order had been entered, and even though Mr. Fox was a represented defendant in the civil conspiracy case.

Here, Schaefer's communication concerned the civil conspiracy case, not only the criminal case. Also, a no-contact order had been entered by the court, and Schaefer violated it. Finally, the substance of Schaefer's contact was an attempt to persuade the Foxes to change their testimony in the criminal case to favor Schaefer – an illegal communication.[31] Accordingly, Schaefer's argument is without merit.

Propriety of continued hearing

Schaefer challenges the denial of his request for a continuance of the second hearing date so that he could obtain counsel. Schaefer argues that he is entitled to a new hearing because the second hearing was reset for January 4, not later in the month. According to Schaefer,

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[31] NRS 199.240 (providing that offering compensation or reward to a witness to influence his testimony in an official proceeding is a category C felony).

he was not able to find new counsel because no one wanted to work on his case over the holidays.

We are not persuaded by Schaefer's argument. Schaefer stated on the record that he needed no more than one week's notice of the continued hearing, and was aware from November 17, 1999, that he needed to find counsel immediately. Additionally, he was notified no later than December 6, 1999, of the new hearing date. Even from December 6, Schaefer had four weeks to obtain new counsel and to prepare for the continued hearing. Schaefer has not demonstrated that this period was insufficient and that he is entitled to a new hearing.

Adequacy of evidence supporting violations

Although the recommendations of the disciplinary panel are persuasive, this court is not bound by the panel's findings and recommendation, and must examine the record anew and exercise independent judgment.[32] Ethical violations must be proven by clear and convincing evidence, which this court has described as evidence which " 'need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn.' "[33]

In connection with the order Schaefer prepared in the injunction case, the panel found that Schaefer violated SCR 173(3) (fairness to opposing party and counsel: disobeying obligation to tribunal) and SCR 203(4) (conduct

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[32] *In re Kenick*, 100 Nev. 273, 680 P.2d 972 (1984).

[33] *In re Stuhff*, 108 Nev. 629, 635, 837 P.2d 853, 856 (1992) (quoting *Gruber v. Baker*, 20 Nev. 453, 477, 23 P. 858, 865 (1890)).

prejudicial to the administration of justice). The record demonstrates that Schaefer deliberately included an award of costs to Schaefer, Inc., in the order he prepared when the district court had not awarded any costs. He subsequently refused to stipulate to a modification of the order, thus forcing opposing counsel to file a motion to amend. We conclude that the violation of SCR 173(3) is supported by clear and convincing evidence. We disregard the violation of SCR 203(4), as no such violation was charged for this conduct in the complaint.[34]

With respect to Schaefer's visit to the Foxes, the panel found that Schaefer had violated SCR 173(6) (fairness to opposing party and counsel: request that witness refrain from providing information), SCR 182 (communication with represented person), SCR 203(2) (criminal act adversely reflecting on fitness to practice), and SCR 203(4) (conduct prejudicial to the administration of justice). We conclude that clear and convincing evidence supports the panel's finding that by offering to dismiss Mr. Fox from the conspiracy case in exchange for favorable testimony in the criminal case, Schaefer violated SCR 173(6).

The panel did not make any findings to support its determination that Schaefer violated SCR 203(2), and the basis for the finding is not clear from the record. Also, the complaint did not include a charge that Schaefer violated

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[34] *Burgess v. Storey County*, 116 Nev. 121, 992 P.2d 856 (2000) (holding that due process requires that party be notified of charges against him); *State Bar of Nevada v. Claiborne*, 104 Nev. 115, 756 P.2d 464 (1988) (noting that due process requirements must be met in bar proceedings).

this rule, but rather SCR 203(3). In addition, the complaint did not charge violations of SCR 182 or SCR 203(4) for this conduct. Accordingly, we conclude that these violations may not be considered.[35]

Concerning the global settlement, the panel found that Schaefer violated SCR 182 (communication with represented party). The record demonstrates that Schaefer repeatedly contacted the Association president directly concerning the settlement, despite a specific request that all contact be through counsel. The violation of SCR 182 is thus supported by clear and convincing evidence. As Schaefer was representing Schaefer, Inc., in this matter, the violation may be considered in determining an appropriate sanction.

In the receivership case, the panel found that Schaefer violated SCR 170 (meritorious claims), SCR 182 (communication with represented party), SCR 203(1) (violation of the rules of professional conduct), SCR 203(3) (misconduct involving dishonesty, deceit, fraud or misrepresentation), and SCR 203(4) (conduct prejudicial to administration of justice). The record reflects that Schaefer included the Thaler Trust as a party-plaintiff when the trustee had not authorized him to do so, and at a time when he knew the trustee was out of the country for several months and would not discover his actions. The record also reflects that the complaint was frivolous, and that the district court imposed sanctions of $5,000, which Schaefer has persistently refused to pay. We conclude that

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[35] *Id.*; *see also Robison v. Robison*, 100 Nev. 668, 691 P.2d 451 (1984) (noting that a tribunal's findings must include a sufficient factual basis for its ultimate conclusions).

the violations of SCR 170 and SCR 203(3) are supported by clear and convincing evidence. As the complaint did not charge violations of SCR 182, SCR 203(1) or SCR 203(4) based on this conduct, these violations will not be considered.[36]

With respect to the Mirage cases, the panel found that Schaefer violated SCR 182 by directly contacting officers, directors and employees of the Mirage, even after specifically requested by Mirage Resorts' general counsel to refrain from such contact. The record contains clear and convincing evidence of these contacts. But since Schaefer was representing himself in these cases, we do not consider this violation in determining the appropriate discipline to be imposed.

In the Texas case, the panel found that Schaefer violated SCR 172 (candor toward the tribunal), SCR 203(3) (misconduct involving dishonesty, deceit, fraud or misrepresentation), and SCR 203(4) (conduct prejudicial to the administration of justice) by submitting a false affidavit in support of his application for admission pro hac vice. SCR 99 provides that this court has disciplinary jurisdiction over attorneys admitted in this state. Moreover, SCR 203.5 specifically provides that this court has jurisdiction over a lawyer licensed in Nevada even if practicing elsewhere. Thus, Schaefer's conduct in Texas is subject to discipline in Nevada. We conclude that by claiming he had not been subject to discipline within the pertinent time period, when in fact he had, Schaefer

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[36] *Burgess*, 116 Nev. at 124-25, 992 P.2d at 858; *Claiborne*, 104 Nev. at 216-17, 756 P.2d at 530.

violated SCR 172 and SCR 203(3). We disregard the panel's finding that Schaefer violated SCR 203(4), as no such violation was charged in the complaint.[37]

Propriety of recommended discipline

The panel found one violation of SCR 170 (meritorious claims), one violation of SCR 172 (candor toward the tribunal), one violation of SCR 173(3) (fairness to opposing party and counsel: disobeying obligation to tribunal), one violation of SCR 173(6) (fairness to opposing party and counsel: request that witness refrain from providing information), four violations of SCR 182 (communication with represented party), one violation of SCR 203(1) (violation of the rules of professional conduct), one violation of SCR 203(2) (criminal act adversely reflecting on lawyer's fitness), two violations of SCR 203(3) (misconduct involving dishonesty, deceit, fraud or misrepresentation), and five violations of SCR 203(4) (conduct prejudicial to administration of justice). As discussed above, we do not consider one of the SCR 182 violations, since Schaefer was representing himself in that instance. We also disregard two of the SCR 182 violations, the SCR 203(1) violation, the SCR 203(2) violation and four of the SCR 203(4) violations, as no such violations were charged in the complaint based upon the particular conduct relied upon by the panel.

The panel also found that the aggravating factors of a pattern of misconduct, multiple offenses, and Schaefer's

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[37] *Burgess*, 116 Nev. at 124-25, 992 P.2d at 858; *Claiborne*, 104 Nev. at 216-17, 756 P.2d at 530.

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refusal to acknowledge the wrongfulness of his actions had been shown by clear and convincing evidence. We conclude that the record supports the panel's finding of aggravating factors. Multiple offenses have been shown, as has a pattern of misconduct. In addition, Schaefer steadfastly maintains that all of his conduct was permissible, and fails to acknowledge in any way that his conduct was wrongful.

Schaefer's discipline history is of relevance in determining the appropriate sanction to be imposed, and it includes two public reprimands and a suspension. The first public reprimand was by this court in 1981 for taking a default without notice to opposing counsel even though counsel had appeared in the action, and for engaging in settlement discussions with a represented party without counsel's consent. Schaefer also received a public reprimand from this court in 1995, as reciprocal discipline based on a 1993 California order including numerous probationary conditions, for (1) willfully failing to maintain the respect due the courts by disobeying a United States District Court order of October 13, 1993; (2) making a threatening statement to opposing counsel; and (3) failing to safeguard a client's files after the termination of his representation. In 1998, Schaefer received a one-year stayed suspension from this court, with 30 days actually served, as reciprocal discipline for a 1997 California order, based on Schaefer's failure to comply with the probationary conditions imposed by the California court's 1993 disciplinary order.

CONCLUSION

We conclude that disbarment is warranted. The record reflects a blatant disregard by Schaefer for the rights of others and the administration of justice. This pattern is demonstrated by Schaefer's actions in naming the Thaler Trust as a party without authorization, his attempt to influence a witness's testimony, his self-serving award of costs without court order, and his false affidavit to the Texas court. Schaefer's persistent refusal to recognize that any of his actions were improper indicates that his behavior is not likely to improve in the future. Under these circumstances, disbarment is the only sanction that will adequately serve the purposes of attorney discipline: to protect the public and the integrity of the bar.[38]

Accordingly, John Michael Schaefer is disbarred. Schaefer shall pay the costs of the disciplinary proceeding within thirty (30) days, and Schaefer and the state bar shall comply with SCR 115.

/s/ Maupin, C.J.
Maupin

/s/ Young, J.
Young

/s/ Shearing, J.
Shearing

/s/ Agosti, J.
Agosti

/s/ Rose, J.
Rose

/s/ Leavitt, J.
Leavitt

/s/ Becker, J.
Becker

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[38] *Claiborne*, 104 Nev. at 219, 756 P.2d at 531.

Case Nos. #97-161-0868; #99-001-0868; #99-034-0868; #99-076-0868

STATE BAR OF NEVADA

SOUTHERN NEVADA DISCIPLINARY BOARD

STATE BAR OF NEVADA,
Complainant,
v.
JOHN MICHAEL SCHAEFER,
Respondent.

FINDINGS AND RECOMMENDATION OF HEARING PANEL

(Filed May 08, 2000)

After several delays, the hearing in these consolidated cases finally occurred on January 4, 2000. At the close of the hearing, the parties agreed to submit written post-hearing briefs, which they have done. In addition to the briefs, the panel has received the following documents, post-hearing, from Respondent:

1. Objection to Post-Trial Brief; Mitigation dated February 7, 2000;

2. Memorandum Re: Mitigation dated February 12, 2000.

The panel has also received the State Bar's Motion to Strike the above-referenced documents and Respondent's Opposition to the Motion to Strike.

For the reasons set forth in the Motion to Strike, and particularly that Respondent's Objection to Post-Trial Brief and Memorandum Re: Mitigation seek to supplement the evidentiary portion of the record, the Motion to Strike is granted. Respondent's Objection to Post-Trial Brief and Memorandum Re: Mitigation are stricken from the record.

FINDINGS

Count 1

Grievance File #97-161-0868

Based on the testimony and exhibits, the panel makes the following findings:

1. Respondent violated Supreme Court Rules 203(2), 173(6), 182, and 203(4) when he made an evening visit to the home of Mr. and Mrs. Robert Fox on March 9, 1998. Defendant made this visit knowing full well that he was to be sentenced in the criminal battery case involving Mrs. Fox (*State v. Schaefer*, Case No. 97M08424X) two days later. Respondent's visit to the Fox home was more egregious because of the existence of a "no contact order' (see Exhibit 17, page 5, March 11, 1998 entry) which, according to the testimony, ordered him to have no contact with Mrs. Fox.

2. In *Schaefer, Inc. v. Wimbledon*, Case No. A371071, Respondent knowingly prepared an order erroneously awarding the plaintiff, the Respondent's wholly owned corporation, costs of suit. When opposing counsel received the order and brought the error to Respondent's attention, Respondent refused to cooperatively amend

the order. This required the defendant to file a Motion to Alter or Amend. According to Exhibit 12, the court's minutes for May 13, 1997, there was no basis upon which Respondent could have concluded that the court awarded him costs. Respondent's actions violated Supreme Court Rule 173(3) and 203(4).

3. Respondent filed the complaint in *Dan and Evelyn Thaler Trust et al. v. Wimbledon Tennis Club Condominium Association, Inc.*, Case No. A377698. Respondent filed suit on behalf of the plaintiff trust without the authorization of the trustees. Respondent sought the appointment of a receiver in the case without the authorization of the trustees, and in a manner which was contrary to the trustees' interest. The court found that the application for the appointment of receiver was frivolous and groundless, and assessed sanctions of $5,000 against Respondent (Exhibit 15). The panel finds that the Dan and Evelyn Thaler Trust was not a client of Respondent's. His actions violate Supreme Court Rules 170, 203(1), 203(3), and 203(4). In addition, Respondent sent letters to members of the Wimbledon Tennis Association (Exhibit 14). The panel finds that Respondent knew that the Association and its members were represented by John Leach. By communicating with Mr. Leach's clients, Respondent violated Supreme Court Rule 182.

4. The panel also finds that Respondent violated Supreme Court Rule 203(4) by refusing, after the exhaustion of appeals, to pay the $5,000 sanction ordered by the court in the Thaler Trust litigation. (See Exhibit 15, page 2, of the November 10, 1998 amended order of Judge Hardcastle.)

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COUNT TWO

Grievance File #99-001-0868

1. The panel finds that Respondent violated Supreme Court Rules 172, 203(3), and 204(4) by filing a false affidavit in connection with the motion for admission *pro hac vice* in the Texas state district court (see Exhibits 24, 25, and 26).

COUNT THREE

Grievance File #99-034-0868

1. The panel finds that Respondent's actions in contacting the president of the homeowners association, James Fatzinger, in his capacity as the president of the association, violated Supreme Court Rule 182. In this regard, the panel wishes to note for the record that Respondent's conduct in contacting Mr. Fatzinger would clearly violate the rule in those instances in which Respondent was representing his wholly owned corporation, Schaefer, Inc., or any person or entity other than himself personally. In those instances in which Respondent was appearing pro se, the panel believes Formal Opinion #8 issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar properly interprets Supreme Court Rule 182 and prohibits Nevada lawyers appearing pro se from communications with opposing parties represented by counsel.

COUNT ONE

Grievance File No. 99-076-0868

(Consolidated Complaint filed June 22, 1999)

1. The panel finds that Respondent violated Supreme Court Rule 182 when he repeatedly communicated with corporate representatives of Mirage Resorts, Incorporated after being instructed by counsel for Mirage not to do so. See, Exhibits 21 and 22. In this regard, the panel reiterates its adoption of the interpretation of Rule 182 set forth in Formal Opinion #8 issued by the Standing Committee on Ethics and Professional Responsibility.

For the benefit of the Supreme Court in its review of the panel's recommendation, the panel wishes to point out the following:

1. The panel makes no finding with respect to the merit or lack thereof of any of the cases filed by Respondent, either on his behalf or on the behalf of other persons or entities, which are the subject of the consolidated complaints in this proceeding.

2. In making its recommendation, the panel has decided that Respondent's actions in the state of Texas as described in Count 2 of the March 19, 1999 complaint subject him to the jurisdiction of the Southern Nevada Disciplinary Board.

3. The panel is persuaded that the existence of certain of the aggravating circumstances set forth in Section 9.2 of the American Bar Association's Standards for Imposing Lawyer Sanctions justifies its recommendation in this proceeding. In particular, the panel finds that Respondent has engaged in a pattern of misconduct, has

committed multiple offenses of Nevada's Supreme Court Rules, and has refused to acknowledge to the panel, both during the hearing and in his post-hearing brief, the wrongful nature of his conduct.

RECOMMENDATION

The panel is persuaded by the State Bar's discussion in its post-hearing brief (pages 23-28) that Respondent's conduct as alleged in these consolidated cases and as proven at the hearing is of such an extreme and serious nature as to warrant the sanction of disbarment. Accordingly, the panel unanimously recommends that Respondent be disbarred by the Supreme Court of Nevada.

DATED this 8 day of May, 2000.

/s/ Gary R. Goodheart
GARY R. GOODHEART,
CHAIRMAN

/s/ Bruce Shapiro
BRUCE SHAPIRO

/s/ John McMillan
JOHN McMILLAN

/s/ Kristina Holman
KRISTINA HOLMAN

/s/ Terrylynn Hayes
TERRYLYNN HAYES

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CERTIFICATE OF SERVICE BY MAIL

I, TORRI TUELLER, certify that I am a citizen of the United States, over 21 years of age, a resident of Clark County, and not a party to the within action. That I am an employee of the State Bar of Nevada and my business address is 600 E. Charleston Boulevard, Las Vegas, Nevada 89104.

That the undersigned hereby certifies that a true and correct copy of the attached **FINDINGS AND RECOMMENDATION** was placed in a sealed envelope and deposited in the U.S. mail in Las Vegas, Nevada, postage fully prepaid thereon for first class regular and certified mail, addressed to J. Michael Schaefer, at 3930 Swenson, #105, Las Vegas, Nevada, 89119.

DATED this 8th day of May, 2000.

/s/ Torri Tueller
TORRI TUELLER, an Employee
of the State Bar of Nevada

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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF)
J. MICHAEL SCHAEFER,) No. 36173
)

ORDER DENYING REHEARING AND MODIFYING OPINION

(Filed Sep. 10, 2001)

This is a petition for rehearing of this court's opinion disbarring attorney John Michael Schaefer.[1] We conclude that rehearing is not warranted, but modify our opinion as set forth below.

Schaefer first argues that rehearing is warranted because, contrary to the statement at page 3 in our opinion, the district court did not specifically order each party to bear its own costs. Rather, the district court's minute order was silent as to costs. While our opinion inadvertently misstated the district court's order, we were aware of the order's content. Rehearing is not warranted on this basis, but we modify our opinion to accurately reflect the district court's order. Accordingly, the sentence on page 3 that currently reads, "The Association stipulated to this relief, and the court approved the stipulation and ordered each party to bear its own costs," is modified to read, "The Association stipulated to this relief, and the court approved the stipulation; no costs were awarded to either party."

Schaefer next asserts several arguments in support of his position that his visit to the Foxes did not violate any

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[1] *In re Discipline of Schaefer*, 117 Nev. ___, 25 P.3d 191 (2001).

ethical rules. Schaefer first argues that his communication with Mrs. Fox was permissible because, as a criminal defendant representing himself, he had a Sixth Amendment right to contact the witnesses against him. Schaefer does not assert any authority in support of his argument that he had a right to contact Mrs. Fox even in the face of the justice court's no-contact order, and so we need not consider his argument.[2]

In addition, we reject Schaefer's argument that any ethical violations were based on uncharged criminal conduct, and thus deprived Schaefer of due process. Schaefer's disbarment was based, in part, on his violation of SCR 173(6), which was charged in the first disciplinary complaint. While our opinion noted that Schaefer's conduct appeared to violate NRS 199.240, his disbarment was not based on this statute.

Finally, we reject Schaefer's argument that the violation was not shown by clear and convincing evidence because it was supported only by inadmissible hearsay. Schaefer's own testimony at the hearing was that he offered to dismiss Mr. Fox from the conspiracy lawsuit if Mr. Fox agreed not to testify against him at his criminal sentencing hearing. Rehearing is not warranted on this basis.

Next, Schaefer asserts that insufficient evidence was presented as to the identity of the trustee of the Thaler

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[2] *See SIIS v. Buckley*, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984) (noting that this court need not consider argument unsupported by citation to relevant authority).

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Trust. Without such evidence, Schaefer argues the violations based on his conduct in filing a complaint naming the trust as a plaintiff without authorization cannot stand. This argument is without merit. Schaefer admitted at the hearing that he did not have authorization to file the complaint on behalf of the trust.

Schaefer's next argument concerns the $5,000 sanction he was ordered to pay. He asserts that he paid the sanction during the pendency of this appeal. Consequently, he argues that our opinion's statement that he "has persistently failed to pay the sanction" falsely implies that he has yet to pay the sanction. Schaefer attached proof of payment to his petition for rehearing.

Schaefer's disbarment was based in part on his conduct in failing to pay the sanction for over two years, and this is accurately reflected on page 6 of our opinion. But page 27 of the opinion states, "[t]he record also reflects that the complaint was frivolous, and that the district court imposed sanctions of $5,000, which Schaefer has persistently refused to pay." Accordingly, we modify this sentence in our opinion to delete the word "has," so that the sentence reads, "[t]he record also reflects that the complaint was frivolous, and that the district court imposed sanctions of $5,000, which Schaefer persistently refused to pay."

Schaefer next argues that he did not make any misrepresentations in his affidavit to the Texas court. Schaefer states that the discipline he received between 1993 and 1997 was based on an incident occurring in 1992, and that his affidavit was accurate in this regard. Schaefer's

argument is without merit. The 1995 California suspension and the 1997 reciprocal Nevada suspension were based on Schaefer's conduct in failing to comply with the terms of his probation – conduct which occurred within the five-year period referenced in the Texas affidavit.

Schaefer then repeats the arguments made in his briefs concerning the constitutionality of SCR 182. Specifically, Schaefer again argues that the rule is a content-based speech restriction subject to strict scrutiny under the First Amendment, and that the rule is overbroad in that it reaches a substantial amount of protected speech. These arguments were considered and rejected, and rehearing on this ground is not warranted.[3]

Finally, Schaefer argues that this matter must be remanded to the Southern Nevada Disciplinary Board for a new hearing on the discipline to be imposed. Schaefer asserts that as we held that certain violations could not be considered, the hearing panel must reconvene to determine the appropriate discipline. Schaefer also maintains that when the SCR 182 violations are not considered, there is insufficient evidence of a pattern of misconduct. Finally, Schaefer asserts that he must be given the opportunity to present mitigating evidence concerning his activities as a "public interest attorney."

We conclude that this argument is without merit. First, this court has final authority over lawyer discipline; a hearing panel only makes recommendations to this

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[3] NRAP 40(c)(1) (stating that matters presented in the briefs may not be reargued on rehearing).

court.[4] Our de novo review extends even to the panel's factual findings.[5] Accordingly, a remand is unnecessary. In addition, Schaefer had a full opportunity to present any evidence in mitigation that he wished at the hearing. He is not entitled to a new hearing on this basis.

Finally, the pattern of misconduct considered by this court did not consist solely of Schaefer's SCR 182 violations, but his conduct as a whole. As noted in our opinion:

> The record reflects a blatant disregard by Schaefer for the rights of others and the administration of justice. This pattern is demonstrated by Schaefer's actions in naming the Thaler Trust as a party without authorization, his attempt to influence a witness's testimony, his self-serving award of costs without court order, and his false affidavit to the Texas court.

Having considered Schaefer's arguments and concluded that none of them warrant rehearing, we deny the petition for rehearing. We modify our previous opinion as set forth in this order.

It is so ORDERED.

/s/ Maupin, C.J.
Maupin

/s/ Young, J.
Young

/s/ Shealing, J.
Shealing

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[4] *In re Kenick*, 100 Nev. 273, 680 P.2d 972 (1984).

[5] *In re Drakulich*, 111 Nev. 1556, 908 P.2d 709 (1995).

/s/ Agosti _____, J.
Agosti

/s/ Rose _____, J.
Rose

/s/ Leavett _____, J.
Leavett

/s/ Becker _____, J.
Becker

cc: Richard D. Pocker, Chair,
Southern Nevada Disciplinary Board
Rob W. Bare, Bar Counsel
Allen W. Kimbrough, Executive Director
Potter Law Offices
J. Michael Schaefer